No. 13-20-00377-CV

In The Court Of Appeals
Thirteenth District Of Texas At Corpus Christi

CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON SUBSCRIBING TO POLICY NO. NAJL05000016-H87, as Subrogee of Momentum Hospitality, Inc. & 75 and Sunny Hospitality d/b/a Fairfield Inn & Suites,
Plaintiff-Appellant

v.

D'AMATO CONVERSANO, INC. d/b/a DCI ENGINEERS,
Defendant-Appellee.

Plaintiff-Appellant's Reply Brief On Appeal

Oral Argument Requested

PAUL B. HINES
(Texas Bar No. 24104750)
Denenberg Tuffley, PLLC
28411 Northwestern Hwy, Suite 600
Southfield, MI 48034
Phone | (248) 549-3900
Facsimile | (248) 593-5808
E-Mail | phines@dt-law.com

Lead Counsel for Plaintiff-Appellant Certain Underwriters at Lloyd's of London Subscribing To Policy No. NAJL05000016-H87, as Subrogee of Momentum Hospitality, Inc. & 75 and Sunny Hospitality d/b/a Fairfield Inn & Suites

TABLE OF CONTENTS

PAGE

INDEX OF AUTHORITIES

PAGE

Cases

INDEX OF AUTHORITIES

(continued) **PAGE**

I. INTRODUCTION

The Appeal Brief submitted by Defendant-Appellee D'Amato Conversano, Inc. d/b/a DCI Engineers ("DCI") is quite striking in two respects. First, DCI is asking this Court to play the role of the Texas Legislature, and amend *Tex. Civ. Prac. & Rem. Code* §150.002. Specifically, it wants this Court to add the word "same" into the phrase "practice in the area of practice," despite the fact the Legislature struck that word from §150.002 in 2009. Clearly, this is something no court can do.

This appeal is governed by §150.002 as written. As Plaintiff-Appellant Certain Underwriters at Lloyd's of London ("Underwriters") established in their Appellant's Brief, §150.002 only requires that a third-party professional providing a Certificate of Merit practice in the general area of practice as the defendant. She/he does not need to practice in the same area as the defendant.

Second, DCI makes an important concession. DCI states that in order to comply with §150.002 (even as DCI believes the statute should be worded) Mr. Coffman must practice structural engineering. [Brief of DCI Engineers, p. 22]. Underwriters agree -- if Mr. Coffman practices structural engineering, then his Affidavit satisfies *Tex. Civ. Prac. & Rem. Code* §150.002.

In their Appellant's Brief, Underwriters established that Mr. Coffman practices structural engineering. They will do so again below. His "practice of forensic engineering, which includes various components of structural engineering"

[CR 141, 287 (Appendix, p. 23], qualifies as the practice of structural engineering under *Tex. Occupations Code* §1001.003. Furthermore, by virtue of his education and experience, Mr. Coffman is competent to practice structural engineering (as he currently does as a forensic engineer). *Tex. Admin Code* §137.59. Accordingly, by DCI's own admission, Mr. Coffman's Affidavit satisfies *Tex. Civ. Prac. & Rem. Code* §150.002, and the District Court's decision to the contrary should be reversed.

II. ARGUMENT

A. ISSUE I - DCI Waived Its Right To Challenge The Coffman Affidavit, And The District Court Reversibly Erred By Holding Otherwise

On page 10 of its Appeal Brief, DCI boldly states "Texas Courts have never found that a party waived its right to dismissal under Chapter 150 under the facts that exist in this case." As Underwriters explained in their Appellant's Brief, that is because no Texas appellate court has ever been presented with a waiver argument based on a confluence of facts that exist here.

This is not the typical §150.002 waiver case, where the focus is often on how long the defendant waited before moving for dismissal, or how much discovery the defendant engaged in. Rather, this case is unique. DCI 1) failed to raise a §150.002 defense when it filed its Answer, 2) sat on the proverbial sidelines while other defendants timely raised (and litigated) §150.002 defenses, and 3) filed a traditional motion for summary judgment, and made no effort to assert a §150.002 defense until well after that motion was denied. Taken together, this certainly is conduct

"inconsistent with the right of dismissal [pursuant to §150.002] without litigation." *LaLonde v Gosnell*, 593 S.W.3d 212, 225 (Tex. 2019).

In its Brief on Appeal, DCI attempts to minimize its conduct, but to no avail. For example, with regard to it having filed an Answer containing no reference to *Tex. Civ. Prac. & Rem. Code* §150.002, DCI points to several decisions holding that filing an answer does not equate to an intent to waive a §150.002 defense. However, there is no indication in any of those decisions that the answer failed to contain a §150.002 defense. All those cases hold is that the mere act of filing of an answer does not generally evidence an intent to litigate the matter on the merits (as opposed to obtaining a non-merits dismissal based on §150.002).

There is no dispute that a §150.002 defense can be waived, so by definition it is a non-jurisdictional defense. *Crosstex Energy Services, L.P. v Pro Plus, Inc.*, 430 S.W.3d 384, 393 (Tex. 2014); *Frazier v GNRC Realty, LLC*, 476 N.W.3d 70, 73 (Tex. App. - Corpus Christi-Edinburg 2014, pet. den.). Here, DCI made the conscious decision to file an Answer, which included a number of substantive defenses. [CR 290-293 (App. 26-29)]. A *Tex. Civ. Prac. & Rem. Code* §150.002 defense was not one of them. Because <u>any</u> non-jurisdictional defense (regardless whether it is required to be pled by statute) not raised in an answer is considered waived, DCI's failure to assert a §150.002 defense is compelling evidence of an intent to waive that defense. Tex. R. Civ. P. 94; *Earth Power A/C and Heat, Inc. v*

Page, 604 S.W.3d 519, 524 (Tex. App. - Houston [14th Dist.] 2020, no pet.); *Texas Department of Health v Rocha*, 102 S.W.3d 348, 353 (Tex. App. - Corpus Christi-Edinburg 2003, no pet.).[1]

Equally compelling is the choice DCI made early on in this litigation. Instead of seeking a non-merits dismissal pursuant to §150.002, it filed a traditional motion for summary judgment. *LaLonde*, 593 S.W.3d at 225 (suggesting that may be the strongest indicator of an intent to waive the defense). DCI states Underwriters' counsel encouraged the filing of that motion so that a waiver of subrogation issue could be addressed before possibly engaging in settlement discussions. While true, that has no bearing on DCI's decision not to file an early §150.002 motion. Nobody (certainly not Underwriters' counsel) could prevent DCI from filing a motion for summary judgment and a §150.002 motion at the same time. It was clearly a deliberate decision on DCI's part not to do so. Indeed, DCI taking a litigation path that it acknowledged might lead to early settlement discussions is further evidence of waiver. By rejecting a waiver argument, the District Court reversibly erred.

---

[1] Citing to *Shell Chemical Co. v Lamb*, 493 S.W.2d 742 (Tex. 1973), DCI asserts that by filing a general denial in its Answer, this somehow preserved any and all defenses, whether specifically pled or not. This is simply incorrect. All *Shell Chemical* says is that the filing of a general denial constitutes a denial of all allegations in the complaint. It is well-settled in Texas that a general denial (without more) constitutes a waiver of any and all affirmative defenses. *Fawcet v Grosu*, 498 S.W.3d 650, 663 (Tex. App. - Houston [14th Dist.] 2016, no pet.); *Noble Exploration v Nixon Drilling, Inc.*, 794 S.W.2d 589, 591-592 (Tex. App. - Austin 1990, no pet.). As such, if a defendant intends to assert a non-jurisdictional affirmative defense (such as *Tex. Civ. Prac. & Rem. Code* §150.002), it must specifically assert that defense. DCI did not do that here.

B. ISSUE II - The Coffman Affidavit Satisfies Texas' Certificate Of Merit Statute, And The District Court Reversibly Erred By Holding Otherwise

Mr. Coffman set out his qualifications (and similarities in practice to DCI) in Paragraph 1 of his Affidavit:

> I am a registered professional engineer, licensed as a civil engineer in the State of Texas (No. 105940). I have more than 8 years of experience in civil, structural, and forensic professional engineer[ing]. . .I am actively engaged in the practice of forensic engineering, which includes various components of structural engineering. I have in the past performed structural engineering designs for commercial structures, similar to the subject property, as well as residential structures. My design work has primarily been for structures in high-wind areas, similar to Rockport, Texas.

[CR 287; App. p. 23][underscoring added]. In their Appellant's Brief, Underwriters explained how this unequivocally establishes that Mr. Coffman practices in DCI's general area of practice, which is all that *Tex. Civ. Prac. & Rem. Code* §150.002 requires.

As will be discussed below, DCI's Appeal Brief does not place that conclusion in doubt. If anything, it provides further support for this conclusion. As such, the District Court reversibly erred.

1. DCI's construction of *Tex. Civ. Prac. & Rem. Code*. §150.002 is fundamentally flawed

Prior to 2009, *Tex. Civ. Prac. & Rem. Code* §150.002 required that a third-party professional providing a Certificate of Merit practice "in the same area of practice" as the defendant. As a consequence of a 2009 (and subsequent 2019)

amendment to that statute, the third-party professional must now practice "in the area of practice" as the defendant. *Tex. Civ. Prac. & Rem. Code* §150.002(a)(3). The important word "same" no longer modifies the term "area of practice."[2] Consequently, §150.002 only requires the third-party professional practice in the defendant's general area of practice (as opposed to practicing in the defendant's specialty).

DCI takes a different -- and rather extraordinary -- approach. It contends "area of practice" really is no different than "same area of practice," so this Court should judicially rewrite the statute and add the word "same" back into §150.002(a)(3).

Needless to say, this approach is absolutely improper. To start, many courts that examined the Legislature's removal of the word "same" from §150.002(a)(3) have correctly found it to be far from inconsequential:

> The statute does not state that the affiant's knowledge must relate to the same, much less the same specialty, area of practice. . .[A]gain, the statute no longer requires that the affiant "practice" in the "same" area.

Dunham Engineering, Inc. v Sherwin-Williams Company, 404 S.W.3d 785, 794 (Tex. App. - Houston [14th Dist.] 2013, no pet.). *See also H.W. Lochner, Inc. v Rainbo Club, Inc.*, No. 12-17-00253-CV (Tex. App. - Tyler 2018, no pet.)(2018

[2] This is hardly an oversight by the Legislature. When it wants to use the word "same" in §150.002, it freely does so. For example, in §150.002(a)(2), the statute also requires the third-party professional hold "the same professional license or registration" as the defendant. [Emphasis added]. So while Mr. Coffman must hold the same license as DCI (which he does), he does not need to practice in the same area.

W.L. 2112238, at *3); *Gaertner v Langhoff,* 509 S.W.3d 392, 396-398 (Tex. App. - Houston [1st Dist.] 2014, no pet); *BHP Engineering and Construction, L.P. v Heil Construction Management, Inc.*, No. 13-13-00206-CV (Tex. App. - Corpus Christi-Edinburg 12/5/13, no pet.)(2013 W.L. 9962154, at *5); *Morrison Seifert Murphy, Inc. v Zion,* 384 S.W.3d 421, 426-427 (Tex. App. - Dallas 2012, no pet.).[3]

Furthermore, what DCI is asking this Court to do is contrary to fundamental Texas principles of statutory construction. In interpreting a statute, a court must presume that every word has been used for a purpose, and, just as important, every word excluded was excluded for a purpose. *Pedernal Energy, LLC v Bruington Engineering, Ltd.*, 536 S.W.3d 487, 491-492 (Tex. 2017). Therefore, a court is forbidden from imposing its own judicial meaning on a statute by adding words (such as the word "same") not contained in the statute's language. *Texas Department of Criminal Justice v Rangel*, 595 S.W.3d 198, 210 (Tex. 2020).[4]

---

[3] As Underwriters predicted in their Appellant's Brief (p. 18, n.7), DCI tries to brush all of this authority aside because the cases were decided under the prior version of *Tex. Civ. Prac. & Rem. Code* §150.002, requiring the expert only be "knowledgeable" in the defendant's area of practice. Once again, such an assertion misses the point. Underwriters cite these cases as recognizing the important difference between "same area of practice" and "area of practice." This difference is just as relevant under the current version of §150.002 as it was under the prior version.

[4] DCI violates rules of statutory construction in another respect as well. Based on a 6/12/19 Bill Analysis of §150.002, it argues the word "same" should be read into the statute as that is what the Bill's Author intended. This is improper because 1) extrinsic evidence cannot be used to construe unambiguous statutory language, and 2) the intent of an individual legislator -- even those of a Bill's author -- "do not and cannot describe the understandings, intentions, or motives" of the Legislature. *Texas Health Presbyterian Hospital of Denton v D.A. and M.A.*, 569 S.W.3d 126, 135-137 (Tex. 2018)

This Court should take *Tex. Civ. Prac. & Rem. Code* §150.002 as the Legislature wrote it. If Mr. Coffman practices in DCI's general area of practice, then his Affidavit satisfies the requirements of that statute.

2. A critical concession in DCI's Appellee's Brief

Despite DCI's flawed construction of *Tex. Civ. Prac. & Rem. Code* §150.002(a)(3), it makes a critical concession in its Appeal Brief:

> The "area of practice" of DCI Engineers is that of structural engineering. When the statute says that the third-party professional must be one who "practices in the area of practice of defendant," it is clearly and unambiguously saying that the third-party professional making the affidavit must practice in the same areas of practice of defendant. In this case, that is structural engineering, which Coffman cannot practice (for the reasons set forth above).

[DCI Appeal Brief, p. 22][underscoring added].

Therefore, according to DCI, if Mr. Coffman currently practices structural engineering, then his Affidavit satisfies *Tex. Civ. Prac. & Rem. Code* §150.002. Underwriters absolutely agree.

3. Mr. Coffman is currently practicing structural engineering

Mr. Coffman stated "I am actively engaged in the practice of forensic engineering, which includes various components of structural engineering." [CR 287; App. p. 23]. In their Appellant's Brief, Underwriters established that design engineering (what DCI does) and forensic engineering (what Mr. Coffman currently does) are similar general areas of practice (something DCI does not challenge in its

Appeal Brief). Because Mr. Coffman's forensic engineering work involves structural engineering, he is current practicing in the same general area as DCI -- structural engineering.

In response, DCI makes two baseless arguments. First, DCI steadfastly asserts (with little if any support[5]) that Mr. Coffman is not currently practicing structural engineering. This argument is easily disposed of by *Tex. Occupations Code* §1001.003(c)(1). That statute defines the "practice of engineering" as including "consultation, investigation, evaluation, analysis. . . providing an engineering opinion or testimony. . ." That obviously is what Mr. Coffman currently does as a forensic engineer -- he investigates and analyzes the cause of building failures. Furthermore, as stated in his Affidavit, Mr. Coffman utilizes structural engineering principles (the same principles used by DCI) in making his "cause of the building failure" determinations. So Mr. Coffman utilizes structural engineering principles in the practice of engineering. Put another way, Mr. Coffman is practicing structural engineering.

---

[5] The most DCI provides is its assertion that Mr. Coffman cannot be practicing structural engineering, as he would be precluded from stamping wind load designs for buildings in the City of Rockport. This is untrue [see CR 336-337]. More important, even if this was true, that might be relevant if *Tex. Civ. Prac. & Rem. Code* §150.002 required that Mr. Coffman practice in the same sub-specialty as DCI. Of course it does not. Once again, the general practice area of structural engineering encompasses many activities, including both design (stamping wind load designs, etc.) and forensic (determining the cause of a building failure) work. DCI does the former, while Mr. Coffman does the latter.

Second, DCI asserts Mr. Coffman would not be competent to engage in structural engineering work. Any professional engineer licensed by the Texas Board of Professional Engineers is able to practice in an area in which he/she is competent. *Texas Admin. Code* §137.59(a). Competence can be gained by education or experience. *Texas Admin. Code* §137.59(b).

With regard to education, Mr. Coffman has a Bachelor's Degree in civil engineering from Louisiana State University, and a Master's Degree in civil engineering with a structural focus from Texas Tech University. [CR 330]. As to experience, Mr. Coffman provided ample evidence of that in his Affidavit:

> I have more than 8 years of experience in civil, structural, and forensic professional engineer[ing]. . .I have in the past performed structural engineering designs for commercial structures, similar to the subject property, as well as residential structures. My design work has primarily been for structures in high-wind areas, similar to Rockport, Texas.

[CR 287; App. p. 23]. Taken together, this far surpasses the threshold for structural engineering competence.

Mr. Coffman is competent to practice structural engineering, and he currently is practicing structural engineering (as a forensic engineer). By DCI's own admission, this is sufficient to satisfy *Tex. Civ. Prac. & Rem. Code* §150.002. By holding otherwise, the District Court reversibly erred.

III. CONCLUSION

For the foregoing reasons, Plaintiff-Appellant Underwriters respectfully requests that the District Court's August 24, 2020 Order dismissing their case against DCI be reversed, and this matter be remanded for further proceedings.

Respectfully submitted,

DENENBERG TUFFLEY, PLLC

/s/ Paul B. Hines
PAUL B. HINES (Texas Bar No. 24104750)
JEFFREY R. LEARNED (MI Bar P38254)
MICHAEL R. MARX (MI Bar P78984)
28411 Northwestern Hwy, Suite 600
Southfield, MI 48034
Phone | (248) 549-3900
Facsimile | (248) 593-5808
phines@dt-law.com

Counsel for Plaintiff-Appellant Certain Underwriters at Lloyd's of London Subscribing To Policy No. NAJL05000016-H87, as Subrogee of Momentum Hospitality, Inc. & 75 and Sunny Hospitality d/b/a Fairfield Inn & Suites

DATED: October 29, 2020

CERTIFICATION OF COMPLIANCE

I certify that this Brief was prepared using Microsoft Word 2016, and that, according to that program's word-count function, the sections covered by Tex. R. App. P. 9.4(i)(1) contain 2,790 words.

Respectfully submitted,

DENENBERG TUFFLEY, PLLC

/s/ Paul B. Hines
PAUL B. HINES (Texas Bar No. 24104750)
JEFFREY R. LEARNED (MI Bar P38254)
MICHAEL R. MARX (MI Bar P78984)
28411 Northwestern Hwy, Suite 600
Southfield, MI 48034
Phone | (248) 549-3900
Facsimile | (248) 593-5808
phines@dt-law.com

Counsel for Plaintiff-Appellant Certain Underwriters at Lloyd's of London Subscribing To Policy No. NAJL05000016-H87, as Subrogee of Momentum Hospitality, Inc. & 75 and Sunny Hospitality d/b/a Fairfield Inn & Suites

DATED: October 29, 2020

CERTIFICATION OF SERVICE

The undersigned certifies that a copy of Plaintiff-Appellant's Reply Brief on Appeal was served on the attorneys of record of all parties to the above appeal via Texas Court's e-filing system, which sends notice to counsel of record on the 29th day of October, 2020.

/s/ Davette R. Seldon
Davette R. Seldon

Automated Certificate of eService

This automated certificate of service was created by the efiling system. The filer served this document via email generated by the efiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Paul Hines
Bar No. 24104750
phines@dt-law.com
Envelope ID: 47646111
Status as of 10/29/2020 2:11 PM CST

Associated Case Party: Certain Underwriters at Lloyd's of London Subscribing to Policy No. NAJL05000016-H87, as Subrogee of Momentum Hospitality, Inc. & 75 and Sunny Hospitality d/b/a Fairfield Inn & Suites,

Name	BarNumber	Email	TimestampSubmitted	Status
Paul BHines		phines@dt-law.com	10/29/2020 1:56:01 PM	SENT
Evan J.Malinowski		emalinowski@dt-law.com	10/29/2020 1:56:01 PM	SENT
Michael R.Marx		mmarx@dt-law.com	10/29/2020 1:56:01 PM	SENT
Davette Seldon		dseldon@dt-law.com	10/29/2020 1:56:01 PM	SENT
Felicia Tyson		ftyson@dt-law.com	10/29/2020 1:56:01 PM	ERROR

Associated Case Party: D'Amato Conversano, d/b/a DCI Engineers, and Mayse & Associates, Inc

Name	BarNumber	Email	TimestampSubmitted	Status
William KLuyties		WKL@lorancethompson.com	10/29/2020 1:56:01 PM	SENT
Paul JGoldenberg		PJG@lorancethompson.com	10/29/2020 1:56:01 PM	SENT
Richard ACapshaw		richard@capslaw.com	10/29/2020 1:56:01 PM	SENT
Stanhope BDenegre		stan@capslaw.com	10/29/2020 1:56:01 PM	SENT
Mark A.Youngjohn		myoungjohn@donatominxbrown.com	10/29/2020 1:56:01 PM	SENT
Aaron Pool		apool@donatominxbrown.com	10/29/2020 1:56:01 PM	SENT